All systems of law, primitive or sophisticated, seek to regulate in some way the disposition of a man’s property after his death, and in a primitive system the fixed rules may well be crude. It may be divided among his children; it may devolve on his eldest son; or some of it may revert to his overlord. Normally scant heed will be paid to the dead man’s wishes. In this matter Roman Law was no exception and as early as the XII Tables it developed a detailed and complex set of rules to deal with this situation. What was exceptional, however, was the precociously early recognition given to a dead man’s dispositions. Evidence of a form of will already in existence by the time of the XII Tables is surely evidence also of an almost universal practice of will making. Indeed that the Romans had something akin to horror of intestacy is illustrated by the story of Cato the Elder, who, looking back on his life, admitted to three regrets — that he had told his wife a secret, that he had made a journey by boat when he might have walked, and that he had lived one day intestate.

By contrast, complete power of testation did not exist in England until the middle of the seventeenth century, though many and various were the devices dreamed up to get round this lack in the law. But the value of feudal incidents of land holding, to the mesne lords and ultimately to the Crown itself, postponed will-making with respect to land until such incidents were no longer a source of wealth.

But testamentary freedom, allied to a robust belief in the right of every man to do as he likes with his own, had its drawbacks the Romans found, so with their genius for the practical, they set to work to evolve and develop rules which would strike a balance between the freedom of the testator to dispose of his property as and how he liked, and the claims of his family. In this field of law as in so many others the Romans worked out a compromise at a much earlier stage in their development than many modern systems, and Civil Law systems tracing their origin back to Roman Law have in fact
incorporated these concepts into their Corpus Juris. English law on the other hand, rooted firmly in the Common Law tradition and slow to recognise freedom of testation was slower still to provide any remedy for its abuse. In the end, the lead came not from the oldest but the youngest of the Common Law countries. New Zealand enacted its first Testator’s Family Maintenance Act in 1900. Nearly forty years was to elapse before England, with much hesitation and many reservations, followed suit.

How then did Roman Law deal with this problem of conflict between the testator and his family? At the outset one fundamental point must be stressed. The Roman approach to the whole idea of succession to property was based not on economic but on social and religious considerations. These, for the Roman, were of paramount importance. The continuity of the patriarchal family must be ensured. There must always be someone on whom the duty of maintaining the family sacra would devolve. It is no mere chance that the making of early wills, along with that form of adoption known as adrogatio and whose specific purpose was to ensure the continuance of the family of a man without descendants, should take place before the comitia calata — the comitia curiata called together for these special purposes and presided over on these occasions by the Pontifex Maximus, the ultimate guardian of the sacra.

The Roman heir or heres was therefore right down until Justinian’s time, vastly different from his modern counterpart. His was a universal succession. He stepped into the dead man’s shoes, or put on the dead man’s legal clothing and in him the family went on. He might be appointed (or instituted) by will, or if there were no will, designated by law, and rules of intestate succession were laid down as early as the XII Tables. But an heres there had to be; without him no succession could take place. Moreover the hereditas to which he succeeded consisted of the whole complex of rights and duties; he took both the burden of the inheritance and the benefit. Indeed the damnosa hereditas, in which the liabilities exceed the assets, always presented a stock problem to the Roman lawyer until later law mitigated its burdens for all classes of heirs. Equally his right to any undistributed surplus was fundamental to this idea of universal succession. The rule was “Nemo pro parte testatus pro parte intestatus decedere potest,” and Roman Law would not countenance the undisposed part of an estate devolving on those entitled to take on an intestacy as happens in English law and in other systems. Allied to this was the proposition “Semel heres, semper heres.” These two rules
ensured that there was no gap in the ownership of the family property, nor in the conduct of the family *sacra*.

It was the Latin equivalent of "The King is dead, long live the King."

Since the carrying on of a man’s family was the paramount aim, the first principle of the early law of succession was that an inheritance devolved on the dead man’s children. Any person or persons in the *potestas* or *manus* of the dead man and who became *sui juris* on his death were all jointly *sui heredes*. The rule was exclusively agnatic and the wife *in manu* took her place along with sons and daughters *in potestate* together with any adopted children. Moreover the *sui* had no power of refusal. They were *sui et necessarii*. The continuity of the family was more important than the interests of the individual.

Other heirs however, could be instituted. The *hereditas* might pass to persons outside the family, *extranei heredes*, by a properly drafted will, or in the absence of *sui heredes*, by the rules of intestate succession. These differed from the *sui* in that their succession was neither automatic nor immediate. They had a choice and did not become *heredes* until they had manifested their intention to enter upon the inheritance. This could be by a set form of words, or an act construed as indicative of such an intention. The prospective *heres*, anxious to discover whether the *hereditas* was worth entering upon, had therefore to tread very carefully lest his actions be misconstrued and an acceptance implied that he did not intend.

If there were no *sui heredes*, the testator, particularly the financially embarrassed testator, had to reckon on the possibility that the stranger *heres* might refuse to enter. There would then be at best an intestacy and probably a posthumous bankruptcy as well. "Neither prospect was welcome to the Roman gentleman." 5 The law met this difficulty by the device of the *heres necessarius*. He was the slave of the testator set free by the will and instituted heir. As his name implies, he had no power of refusal. The possibility of an intestacy was thus excluded, and the bankruptcy if it came to that, would be the bankruptcy of the newly emancipated slave. Later the lawyers found a way of releasing him from the material consequences of this bankruptcy, along with other devices developed to lessen the burdens laid on the *sui heredes* by the strict application of the principle of universal succession. 6
But always the idea prevailed that the children in the *potestas* of the dead man had, as it were, a vested right in the inheritance. This is indeed reflected in their name; they were it has been said, "heirs to themselves". It survived long after the agnatic family and its *sacra* had lost their hold on men's loyalties, and it led directly to the complicated rules for the protection of a man's descendants. For alongside the *pater-familias'* great freedom of testation went the rule existing from as far back as our knowledge goes, that a *suus* must either be instituted or disinherited. It was the testator's duty either expressly to institute as *heres*, or expressly disinherit, those who, but for the will, would have taken the property. If not so disinherited, they were known as *praeteriti*, passed over, and the whole will might fail and the property devolve as on an intestacy.

These rules as to disinheriting were extremely technical as well as seeming strange to modern thinking. In fact, however, they constituted a limitation on the testator only as to form, and might therefore afford no real protection to the family. If he observed the due formalities and avoided the many pitfalls his dependants could be ruthlessly excluded.

In the early days when wills were publicly declared, a testator might have found this formal fetter a strong deterrent. He might have had to make a reasoned defence of his disherisions before the *populus* would sanction his will in the *comitia calata*. Though today such rules might seem to have only a nuisance value once the will had become secret, as it had long before Gaius' time, the Romans presumably regarded them very differently. Otherwise it is scarcely credible that they would have lasted right through the law's history. The answer lies perhaps in the moral outlook of a typical Roman *pater-familias*. He would not fail to make provision without making it very clear that he felt he was justified in passing over his offending dependants. *Exheredatio* would be as much a moral duty as *institutio*. The normal *pater-familias* under the influence first of the early Roman outlook, then of Stoic philosophy, and finally of Christian ethics, would wish to be regarded as *bonus*. A just distribution of property in his will would indeed be a major factor in such an estimation.

That, however, eventually there were some scandalous cases of disherisions is clear from the emergence of a new remedy. As a protection to the family the principle of *exheredatio*, involved as it was, was defective, for provided the testator took care to disinherit according to the rules of both civil and praetorian law, his 'heirs had
no legal ground for complaint. Soon after the time of Cicero therefore, a new remedy was devised, based on the idea that a testator was under a duty to provide, after his death, for those related to him by near kinship. It was given the name of the *querela inofficiosi testamenti*, the 'plaint of the unduteous will.' It allowed the will to be attacked on the supposition that a testator who, without any good ground, failed to provide for his relatives must be presumed to be insane and his will accordingly invalid.

This "plaint" is peculiar among the institutions of Roman Law in being in its early development the product of court practice. It apparently originated in the late Republic in the centumviral court, a tribunal of some thirty or forty lay judges, which provided an alternative forum to that of a single *judex* for the hearing, in particular, of cases concerning inheritances. Though the claim was made originally (as was a similar proceeding in Greek Law) under the cloak of an assertion that the testator must have been insane, the ground of the complaint came to be simply that the will, by disinheritting the complainant, or making inadequate provision for him, offended against the "officium pietatis", the moral duty which a man owed to his family. It was thus probably an appeal in origin to standards more akin to those upheld by the Censor than to those enforced by a court of law, and in one respect it long retained this discretionary character. The court had to decide whether the testator had a 'just cause' for excluding the complainant and no attempt was made to define a 'justa causa' until Justinian's time. Then in 542 A.D., with the law giver's antipathy to unregulated discretion, he promulgated a long list. In most other respects however, it gradually acquired the precise outlines of a legal institution.

Originally, for example, the remedy was open to those persons who had been either disinherited in a will (or in the case of a woman's will omitted) and who would have been the testator's nearest heir had there been an intestacy. In course of time the class of person who could bring the *querela* was regulated, and eventually it was settled that claims were to be brought in the following order: by children against the will of a father or mother; by parents against the wills of their children; and lastly by brothers and sisters. In this latter case a claim was allowed only if a 'base person', *turpis persona*, had been instituted.

Other precise rules also developed. These persons could claim only if they could get their rights in no other way, in other words it was a remedy of last resort. If the *suus heres* could get redress under the
rules of exheredatio, or obtain bonorum possessio from the praetor, he was denied the querela. Clearly this was because it involved, in its early stages anyway, an imputation of insanity, and any such aspersion should not be made except when no alternative remedy was available. Moreover the claimant must not have deserved to be disinherited, and he must show that no adequate provision had been made for him. Such provision later came to be fixed at a fourth of what he would have been entitled to on an intestacy, presumably by analogy with the ‘Falcidian fourth’ which the heir was entitled to retain out of the estate as against legatees. This legitima pars or portio as it was called became the modern legitim under French, German and Scottish law.

The results of a successful querela varied according to circumstances. In the simplest case where there was only one possible claimant and only one instituted heir, the will was invalidated and an intestacy created. The claimant took the whole inheritance and all subsidiary provisions of the will, such as legacies, were void. On the other hand, if there were several heirs instituted, the querela might be brought against only one of them. In this case the will failed only to the extent of that one share and the legacies, if any, were proportionately invalidated. Such an action was in fact an abrogation of the rule that forbade a partial intestacy.

The law was thus arbitrary and unsatisfactory. It appeared to say that certain persons had a right to a legitima pars, yet the result of the testator’s failing in his duty would normally be to give them a great deal more. In addition it was often difficult for the testator to make sure that he was complying with the law; the value of an inheritance might increase greatly just before his death, or some members of a class might die, thus increasing the legitimae portiones of the survivors. The consequences of such a miscalculation might be to destroy the whole will. Finally because the querela was a last resort remedy, all the complications of the law of exheredatio still existed.

Justinian set to work to remove these defects, though a start had in fact been made a hundred years or so earlier. A rule had been introduced that if a will containing an insufficient gift also contained a direction that the legitimate legal portion should be made up, the querela was excluded and the claimant’s remedy was then the actio ad supplendam legitimam. Justinian’s reforms went a good deal further. First and most significantly he restricted the querela to cases where the complainant had received nothing at all under the will. If he had received something, but less than his legitima pars, he must sue to
have the deficiency made good; he must bring the *actio ad supplendam legitimam*. This did not upset the will but enabled the claimant to get what was left to him made up to one fourth of the share to which he would have been entitled on an intestacy. In other words, a direction to make up the amount whenever this needed to be done, was now implied. Thus the testator was protected from the possibility that a miscalculation might destroy the will and enable the claimant to obtain far more than his legitimate fourth share. (It was a good defence to this action as it was to the *querela* that the complainant had been justly disinherited). But this was not all. His Novel 18 of A.D. 536 established a fresh minimum *legitima pars* in the case of children. If there were four or less they were entitled to one third of the estate; if there were more than four, they took one half. Shares of parents and brothers and sisters remained at one fourth. Just grounds for disinheriting were set out in Novel 115 promulgated in 542 A.D. There were fourteen in the case of children, eight in the case of parents, and three in the case of brothers and sisters, and the burden of justifying the disherision lay on the instituted heir. Lastly, by the same Novel, Justinian introduced an entirely new condition by requiring that any descendant or ascendant entitled to a *legitima pars* must be instituted an heir. If he were so instituted but received less than his portion, he was limited to bringing the action to supplement it only. If he were not instituted, the *querela* lay, but its effect was now to replace the heir or heirs instituted in the will by the successful claimant or claimants. In effect there was a will without an instituted heres.

The exact result of Justinian's sweeping changes has been the subject of much controversy. It would seem likely that his intention was to combine the principles of the *legitima pars* with those of *exheredatio* and the praetorian remedy of *bonorum possessio contra tabulas* but scholars debate whether he did achieve in fact this result. Finally, it should be mentioned that from the late classical period there existed two supplementary *querela* whose purpose was to prevent a testator thwarting the main *querela* by open handed largesse in his lifetime.

Such was the Roman attempt to resolve the conflict between testamentary freedom and family protection, and in most modern Civil law systems which have, of course, a Roman ancestry, the principle of the *legitima pars* is an integral part. The general rule is that a certain proportion of a testator's estate cannot be disposed of but must be reserved for his close relatives.
French law allows freedom of testation only where the testator has no descendants or ascendants. A testator with one child may dispose of half of his estate; with two, of one third; and with three or more, one fourth. If he has no descendants but ascendants in both lines he may dispose of half of his property, if in one line only, he may dispose of three fourths.

Those countries whose law is based on the French Code Napoleon, and this includes Italy, Spain, Belgium, Rumania, Bulgaria, Greece, Japan, Turkey and Egypt, have also accepted this principle of legitim. Moreover, Louisiana, whose Civil Code is founded on the French Code, is the only North American state to deal with family protection in this way.

Dutch recognition of the principle is similar to that of France. Germany on the other hand approaches the problem from a slightly different angle. There, freedom of testation is allowed subject to a right vested in the relatives to claim a share if they so wish. The Swiss Civil Code of 1907, which was largely modelled on the German Code, contains detailed provisions relating to legitim, and this is true also of Austrian Law.

Under Scottish law a widow is entitled to the *ius relictae* — one half of the moveable property of her deceased husband if he leaves no children; and one third if there are children. She also has an interest in his heritable property. Children are entitled to one third or one half depending on whether there is or is not a widower, and the widower has similar rights.

In striking contrast has been the attitude of English law. Only in 1938 did it recognise the duty of a testator to provide for his family by the passing of the Inheritance (Family Provision) Act. Until then, as it has been said, he could give his fortune to his mistress and leave his wife and children destitute. Even then this Act made but a very timid and tentative effort to deal with the problem on which the Romans had made such a vigorous and determined attack. Considerable improvements have however been made by more recent legislation, notably the Intestate Estates Act 1952 and the Family Provision Act 1966.

New Zealand on the other hand can claim credit for being the first Common law country to fetter testamentary freedom in the interests of the family. The spirit of legislative reform which characterized this country at the end of the nineteenth century led to the passing in 1900 of the Testator's Family Maintenance Act. By this act the Supreme Court was empowered to order provision to be made
out of the estate of a deceased person who had died leaving a will which did not make *adequate provision for the proper maintenance and support* of a wife, husband or children. This Act and its subsequent amendments were consolidated in the Family Protection Act 1908, which in its turn was extensively amended so as to extend the principle of the legislation to the estates of intestates, and the class of possible applicants was widened to include grandchildren, adopted children, step-children, parents and illegitimate children. (Unlike Roman Law, however, no provision is made for a claim by brothers and sisters.) The current act is the Family Protection Act 1955, which not only consolidated the existing law but again introduced a number of innovations.

The framers of the original New Zealand legislation would have had before them the English rules as to the distribution of estates on intestacy, and they would presumably have been aware of the principle of legitim obtaining in Scotland and in Europe. They might even have been familiar with the Roman Law *querela* and the *actio supplendam legitimam*. But they would have none of these fixed schemes and portions. They were prepared to trust their judges, and what was to be adequate provision for proper maintenance and support was left to the discretion of the court.

The principles on which the court will exercise this discretion have been summarized by Salmond J. in *Allen v. Manchester* in 1922. In giving judgment he said that “the provisions which the Court may properly make in default of a testamentary provision is that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances. If it is manifest that the testator has, whether consciously or inadvertently, failed to perform this duty, it is the right and duty of the Court to perform it for him, by making such alterations in his testamentary dispositions as may be adequate, but no more than adequate, for that purpose.”

This then, is the New Zealand Act and the one that has furnished the pattern for legislation in all the Australian States, though there are, of course, differences in matters of detail. In Victoria, Tasmania and Queensland, for example, the controlling phrase is “sufficient means for maintenance and support”, or “adequate provision for proper maintenance and support”, whereas in New South Wales, South Australia and Western Australia the phrase used is “adequate provision for proper maintenance and education or advancement in life”. It would not seem however that the addition
of the words "education or advancement in life" has had any marked effect, since the courts in exercising their discretion appear to place more emphasis and reliance on the word "proper". In the leading case of *Dun v. Dun*, 11 the Privy Council took the view that "the intention of all the Statutes in this field was to enable the court to vary the provision of a will in cases where it was satisfied that the testator had not made proper provision for a dependant."

Canadian statutes too, follow the discretionary method of relief rather than that of a fixed portion or legitim, though the limits of relief and the possible applicants vary. In Alberta the Widows Relief Act 1922, provides that a widow who receives under her husband's will less than she would receive if he had died intestate may apply to the court for relief. A similar provision appears in the Saskatchewan Widows Relief Act 1930. The Testator's Family Maintenance Act 1924 of British Columbia parallels very closely the New Zealand legislation. In Ontario, the Dependents' Relief Act 1929 provides that children as well as the widow may apply for relief in the discretion of the court. Quebec, however, allows substantial freedom of testation. Its law consists of the old law of France prior to the Code Napoleon and is thus outside Roman influence.

The law of almost all of the States of the U.S.A. is based on English law before the Declaration of Independence, but subsequent local legislation has produced a great divergence of rules, and States now exhibit wide variations between testamentary freedom on the one hand and protection of the family on the other. In Dakota, for instance, there is no protection for a testator's family beyond the right of a widow to a homestead, whereas in Maine there is a discretionary power in the court similar to that in force in the Commonwealth countries. Children, generally speaking, are less favourably placed than a widow.

Clearly then the family lawyer of today, whether he be trained in the Common law system which embraces practically all the English speaking world, or whether his allegiance is to a system which traces its origin back to the Corpus Juris of Justinian, accepts without question the need for restraining testamentary freedom in the interest of the testator's family. The Common law puts its trust in judges exercising their discretion and the Civil law in fixed portions or legitim. Each has its advantages and each its drawbacks, but both seek to achieve the same object. What may not always be so apparent is the debt which the modern lawyer owes to his Roman counterpart whose practical genius devised extraordinarily early a solution which
still informs the law today. The Roman jurist measured the family’s need by the standard expected of a *bonus pater familias*; our courts speak of a “just and wise father”. The test is the same but assuredly the Romans used it first.

NOTES

2. He would not have listened to a modern critic who described a will as “an expression of the will of a man who no longer has any will, respecting property which is no longer his property; it is the act of a man no longer accountable for his acts to mankind; it is an absurdity, and an absurdity should not have the force of law.” See B. Nicholas, *An Introduction to Roman Law*, p.252.
5. Nicholas, *op. cit.* p. 239.
6. *Vide supra*, n.4
8. Such a term has now been expunged from New Zealand law by the Status of Children Act 1968.
    Victoria: Administration and Probate Act 1928, ss. 138-147.
    Queensland: Testator’s Family Maintenance Act 1918-1943.
    Western Australia: Testator’s Family Maintenance Act 1939-1944.